Supreme Court, U. S.
FILED
APR 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1527

LUIS J. LAJE,
Petitioner

v.

R. E. THOMASON GENERAL HOSPITAL,
Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Fifth Circuit

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Dr. Luis J. Laje, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which denied staff privileges to the Petitioner and reversed the determination of the lower court.

OPINIONS BELOW

The order of the District Court for the Western District of Texas is unreported. The opinion of the Court of Appeals is reported at 564 F.2d 1159. The order denying rehearing is unreported. All opinions and orders are appended hereto.

JURISDICTION

The order sought to be reviewed was made and entered on December 9, 1977. An order denying a timely motion for rehearing was made and entered on February 1, 1978. The statutory provision which confers jurisdiction on this Court is 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What standards should be followed to insure due process to physicians who are denied staff privileges at public hospitals?

2. Must actions brought under 42 U.S.C. § 1983 be remanded to administrative bodies who have previously refused to grant a hearing before the District Court will consider the claim?

3. What type of decision-maker is required by the Fourteenth Amendment's dictate of a fair and impartial tribunal?

4. Can statistical evaluations of evidence be considered in determining whether a decision is supported by substantial evidence?

5. How does substantive due process intervene in these matters to insure that physicians (even those whose procedural rights have been observed) are not arbitrarily and capriciously denied liberty and property?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, United States Constitution, Section 1, Clause 2: ". . . nor shall any state deprive any person of life, liberty or property, without due process of law;

nor deny to any person within its jurisdiction equal protection of the laws."

42 U.S.C. § 1983 (1970): "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

On June 15, 1971, Luis J. Laje was hired as Clinical Director of Psychiatry for a term of two years, at R. E. Thomason General Hospital, a public hospital operated as a county hospital district in El Paso County, Texas. A year later, in August of 1972, Dr. Laje was summarily discharged by the Hospital. The administrator told Dr. Laje he was dismissed, without giving any reason. No hearing was held, and Dr. Laje received no notice of any charges prior to dismissal.

Realizing that the summary discharge from his position had also taken away his staff privileges, Dr. Laje applied for the reinstatement of these privileges in September, 1972. In processing his application, the hospital violated its own bylaws, and no attempt was made to respond to his numerous requests to be heard.

On April 12, 1973, the Executive Committee made a tentative decision to deny staff privileges with the understanding that further discussion would be entertained. Dr. Laje was not advised of the decision to deny privileges; he continued to request action on his application. His requests were ignored, again in contravention of the bylaws.

More than one year after the application for reinstatement of his staff privileges, Dr. Laje filed suit in the United States District Court for the Western District of Texas. Two separate causes of action were brought which alleged denial of constitutional rights in the (1) summary discharge and (2) denial of staff privileges. In an unorthodox procedure and upon Respondent's motion, District Judge Ernest Guinn severed the causes of action. The staff privileges question was then remanded to the Board of Managers, in accordance with Respondent's motion and over the Petitioner's objection.

An adjudicatory hearing was held before Respondent's own Board of Managers, composed of five lay persons. They denied reinstatement of privileges. Dr. Laje then filed a motion in the District Court to review the decision on the basis of due process deficiencies.

On February 6, 1976, the District Court held that the evidence was insufficient to support the Board's findings of incompetence and insubordination. Judge William Sessions, taking the bench after the death of Judge Guinn, reversed the Board's decision and ordered the reinstatement of privileges.

After staying the order to reinstate privileges, Respondent appealed the judgment to the United States Court of Appeals for the Fifth Circuit. On December 9, 1977, the Fifth Circuit reversed the District Court's determination.

REASONS THE WRIT SHOULD BE GRANTED

I.

IMPORTANCE OF THE QUESTIONS PRESENTED

A. No Uniform Standard Exists For Reviewing Denials Of Hospital Privileges To Physicians.

This Petition presents an important question which is the subject of extensive litigation in the lower courts—when and by what procedural safeguards must a physician's liberty and property interests be protected in a public hospital's denial or suspension of staff privileges. The question acquires paramount importance due to the interests at stake in its resolution: the state's indisputable interest in health care and the physician's constitutionally protected liberty and property interests in the pursuit of his profession and the retention of employment.

In 1927, this Court determined that there was no constitutional right to practice medicine at a state-supported or otherwise public hospital. *Hayman v. City of Galveston,* 273 U.S. 414 (1927). The Court also determined that such hospitals could limit their staffs by reasonable classifications. *Id.* at 417. The Court did not and has not established a uniform standard for determining the reasonableness of the hospital's action.

This Court has set forth procedures to be followed in the application of reasonable grounds of exclusion of students, *Horowitz v. Board of Curators of the University of Missouri,* 46 U.S.L.W. 4179 (March 1, 1978), and policemen, *Bishop v. Wood,* 426 U.S. 341 (1976), in order to safeguard Fourteenth Amendment due process rights. Further, the Court has been explicit in determin-

ing when the Fourteenth Amendment intervenes in the dismissal of teachers. *Board of Regents v. Roth,* 408 U.S. 564 (1972); *Perry v. Sindermann,* 408 U.S. 593 (1972). Similar standards are needed for physicians.

B. Remand Of The Denial Of Privileges Claim To The Board Of Managers Was Improper.

Title 42 U.S.C. § 1983 vests original jurisdiction in the United States District Courts. *McNeese v. Board of Education,* 373 U.S. 668, 671-672 (1963). However, as a matter of course, cases of this type are remanded to the administrative body whose conduct is the source and substance of the claim.[1] Because of the unique nature of § 1983, administrative and state remedies need not be exhausted prior to resorting to the federal courts. *Monroe v. Pape,* 365 U.S. 167 (1961). Thus, federal courts should not "automatically" remand cases of this type to the administrative body. Rather, District Courts should consider these issues de novo.

That analysis is consistent with the decision in *Alexander v. Gardner-Denver Company,* 415 U.S. 36 (1974). The determination of civil rights claims cannot be delegated to other decision-makers, whether the tribunal is conducting an adjudicatory hearing or labor arbitration. The place for civil rights claims is in the courts, where they can be fairly and fully adjudicated.

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1. This judicial dilemma was alluded to by the Court in *Pickering v. Board of Education,* 391 U.S. 563, 578, fn. 2 (1968).

II.

CONFLICT OF DECISIONS

A. The Lay Person Composition Of The Board of Managers And Their Pecuniary Interest In The Outcome Of The Hearing Denied The Petitioner A Fair And Impartial Hearing.

A fundamental requirement of due process is a fair tribunal. *In Re Murchison,* 349 U.S. 133 (1955). In an adjudication of a physician's competence, the fair tribunal requirement must be satisfied by a decision-maker who possesses the medical knowledge to determine competence. Beyond this requisite peer review, due process also demands an impartial decision-maker. The Board of Managers who determined Dr. Laje's competence had no medical knowledge and had a pecuniary interest in the outcome.

The failure of the Fifth Circuit to hold that the decision-maker must possess medical expertise to determine a physician's competence is in direct conflict with the Eighth Circuit's holding in *Klinge v. Lutheran Charities Association of Saint Louis,* 523 F.2d 56, 60 (8th Cir. 1975). The Fifth Circuit's holding that actual bias must be shown is in conflict with this Court's holding that "due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff,* 407 U.S. 493, 502 (1972).

Evidence at the hearing related both to the failure to reinstate privileges and the summary discharge. As such, the hospital was given the opportunity to absolve itself of civil liability. The liability for both causes of action

is measured at $380,000.00. This Court has held that even twelve dollars ($12.00) is a sufficient pecuniary interest in the outcome to disqualify a decision-maker. *Tumey v. Ohio,* 273 U.S. 510 (1927). The Court has recently reiterated its stance on disqualifying a judge on the grounds of pecuniary interest. *Ward v. Viliage of Monroeville,* 409 U.S. 57 (1972).

B. The Fifth Circuit Improperly Rejected A Statistical Evaluation Of The Cases Which Purported To Show The Petitioner's Incompetence As A Psychiatrist.

The Fifth Circuit rejected the relevance of a statistical evaluation of the cases considered by the Board of Managers. (Pet. App. B-7). In another 42 U.S.C. § 1983 case, this Court recognized the relevance of a statistical evaluation of the evidence to determine its weight. *Rizzo v. Goode,* 423 U.S. 362, 374 (1976).[2] In *Rizzo,* the validity of the incidents of misconduct was not challenged. Here, Dr. Laje does not concede, nor did the lower courts hold, that the patient histories themselves show incompetence. The proposition is simply that even if the patient histories had cast some doubt on Dr. Laje's competence, their selection and number was inadequate.

In *Rizzo,* this Court found a non-random sampling of cases which showed a small percentage of police misconduct insufficient to prove a pattern of misconduct. In Dr. Laje's case, testimony at the hearing centered on nine

2. In other cases this Court has accepted the use of statistics. *Village of Arlington Heights v. Metropolitan Development Corporation,* ____U.S.____, 97 S.Ct. 555 (1977); *International Brotherhood of Teamsters v. United States,* ____U.S.____, 97 S.Ct. 1843 (1977); *Hazelwood School District, et al v. United States,* ____ U.S.____, 97 S.Ct. 2736 (1977).

patient histories which the hospital claimed showed Dr. Laje's incompetence as a psychiatrist. Special note should be taken that the cases were not randomly selected. In point of fact, the nine cases were hand-picked by Dr. Maurice Marks, Dr. Laje's chief accuser. Further, the nine cases account for 0.82% (.0082) of the 1,100+ patients treated by Dr. Laje during his year at the hospital. The District Court properly considered this statistical evaluation as one factor in determining the insubstantiality of the evidence purporting to show an overall finding of incompetence.

Therefore, the Fifth Circuit's express disavowal of the statistical evaluation of the evidence presented is in direct conflict with this Court's decision in *Rizzo.*

C. The Board's Findings Of Incompetence And Insubordination Were Arbitrary And Capricious, Denying The Petitioner Substantive Due Process.

Petitioner does not argue to this Court that the asserted grounds for dismissal were arbitrary and capricious. Dr. Laje recognizes that the running of a hospital is greatly aided by a competent and cooperative staff. Therefore, the Petitioner acknowledges that the use of incompetence and insubordination as grounds is entirely legitimate, having a real and substantial relation to the goal of running an efficient hospital and to the ultimate goal of protecting public health. *Nebbia v. New York,* 291 U.S. 502 (1934).

It is the application of these legitimate grounds to Dr. Laje that is arbitrary and capricious. The Court has long accepted the premise that governmental action may be Constitutional on its face but unconstitutional as

applied. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Petitioner has established two grounds for the unconstitutional application of the charges to him. First, the Board's findings are not supported by substantial evidence and are, therefore, arbitrary and capricious. In addition, a finding of incompetence on the evidence presented to the Board would hold him to a different and higher standard of proficiency than other psychiatrists practicing at the hospital. This higher standard imposed against Dr. Laje alone denies the Petitioner equal protection of the laws. Therefore, the Petitioner is prevented from pursuing his profession by a state action which can only be classified as arbitrary and capricious.

CONCLUSION

Certiorari should issue when (1) important federal questions are unsettled; (2) a conflict exists between the Court of Appeals' decision and previous decisions of the Supreme Court; (3) a conflict on a point of law exists between the circuits. This Petition presents the Court with all three situations. For these reasons, a writ of certiorari should issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the following attorneys of record on this the 24th day of April, 1978: Mr. Larry Anderson, Attorney at Law, 3100 Fidelity Union Tower Building, Dallas, Texas, 75201; and Mr. James Kirby Read, Attorney at Law 604 Myrtle Avenue, El Paso, Texas, 79901.

Broadus A. Spivey
BROADUS A. SPIVEY

APPENDIX

Order of the U. S. District Court for the Western District of Texas at El Paso A-1

Opinion of the United States Court of Appeals, Fifth Circuit B-1

Order Denying Petitioner's Motion for Rehearing C-1

In The
UNITED STATES DISTRICT COURT
for the Western District of Texas
El Paso Division

NO. EP-73-CA-264

LUIS J. LAJE, Plaintiff,

v.

R. E. THOMASON GENERAL HOSPITAL,
Defendant.

MEMORANDUM AND ORDER

On this day came on to be considered the Motion of the Defendant, R. E. Thomason General Hospital, to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and the Motion of the Plaintiff, Luis J. Laje, to Reverse the Decision by Board of Managers Denying Plaintiff Staff Privileges.

FACTS

Plaintiff filed his Original Complaint with this Court on November 19, 1973, alleging jurisdiction of this Court under 28 U.S.C. 1331(a) and 28 U.S.C. 1343(3) and (4), and contending the violation of his civil rights under the due process clause of the Fourteenth Amendment of the United States Constitution, Section 19 of the Constitution of the State of Texas, and 42 U.S.C. 1983. Briefly, Plaintiff contends that his employment contract with Defendant Hospital was breached when he was summarily discharged from his position as a staff psychiatrist on the staff of R. E. Thomason General Hospital on August 17, 1972, discharge effective August 18, 1972, without a prior hearing or any procedural safeguards in

violation of 42 U.S.C. 1983. Plaintiff further contends that he applied for staff privileges on September 10, 1972, which were denied by the Board of General Managers of the Hospital on December 4, 1972, in violation of due process guaranteed him by the Fourteenth Amendment of the United States Constitution, 42 U.S.C. 1983, and Article 3, Section 3, Section 5(b) of the Hospital By-laws of the Medical Staff. Plaintiff claimed compensatory and exemplary damages in the amount of $360,000.-00.

Defendant filed a Motion to Dismiss and a Motion to Sever as to staff privileges on Decemebr 12, 1973. Plaintiff filed his response on January 28, 1974. Defendant then filed his Amended Motion to Dismiss and Amended Motion to Sever on February 13, 1974, and Brief in Support Thereof. These motions, including the first part of the Defendant's Second Amended Motion to Dismiss and to Sever filed with the Court on February 25, 1974, requested the Court to remand the proceeding to the R. E. Thomason General Hospital for a hearing pursuant to its administrative procedures. On March 15, 1974, the late Judge Ernest Guinn entered an order granting the remand to the R. E. Thomason General Hospital and also decreeing that the Motion to Dismiss in connection with the breach of contract be held in abeyance. On July 10, 1974, the Board of Managers of R. E. Thomason General Hospital upheld the recommendation of the Hospital Medical Committee that staff privileges be denied the Plaintiff on the grounds that Plaintiff was incompetent to practice psychiatry and had engaged in insubordinate acts. This hearing was held on April 25 and 26, 1974.

On August 30, 1974, Plaintiff filed his Amended Original Complaint with the Court incorporating his initial complaint and adding the following:

1. That $27,500.00 of unpaid wages remained on his contract with the Hospital, that in reliance on said contract Plaintiff incurred the expenses of a move from Rhode Island and purchased a home in El Paso, that as a result of his wrongful discharge, Plaintiff has been forced to attempt to establish an office for the private practice of psychiatry in El Paso, Texas, and that Plaintiff and his immediate family have suffered mental pain, distress and anxiety and claim actual and exemplary damages and are entitled to compensation therefor;

(2) That the evidence made available to the Plaintiff in conjunction with the April 25-26 hearing before the Board of Managers of the Hospital confirms Plaintiff's allegations that his application for staff privileges was improperly processed;

(3) That the July 10, 1974, decision by the Board to deny staff privileges is not supported by substantial evidence, and upon a review of the evidence, this Court should reverse that decision, grant staff privileges to Plaintiff, and award damages to Plaintiff.

(4) Plaintiff further contends that he has been damaged by Defendant's conduct in the following amounts:

(a) wrongful and unconstitutional discharge, $80,-000.00 actual damages and $100,000.00 punitive damages due to mental pain and suffering and harm to Plaintiff's reputation; and

(b) wrongful and unconstitutional denial of staff privileges, $175,000.00 actual damages to

Plaintiff's private practice of psychiatry, and $25,000.00 in punitive damages due to mental pain and suffering and harm to Plaintiff's reputation.

Plaintiff filed his Motion to Reverse Decision of the Board of Managers Denying Plaintiff Staff Privileges with this Court on January 27, 1975, in which he alleged that the allegations of incompetence and insubordination upon which the Board of Managers of R. E. Thomason General Hospital denied Plaintiff staff privileges are not supported by substantial evidence, and that there is more than adequate evidence that Plaintiff is qualified to be on the staff of Defendant Hospital. Plaintiff's brief in support of this Motion was filed also on January 27, 1975.

DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In his Order authorizing the hearing of April 25 and 26, 1974, the late Judge Ernest Guinn ordered that this Motion be held in abeyance. It should be considered at this time. Defendant's brief in support of Defendant's Second Amended Motion to Dismiss was filed with this Court on February 28, 1974. The brief appears to support a Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant claims that its discharge of Plaintiff from employment at Defendant Hospital was not a violation of Plaintiff's due process rights within the Fourteenth Amendment to the Constitution. Defendant cites the case of *Birnbaum v. Trussell,* 371 F.2d 672 (2nd Cir. 1966) for what appears to be the proposition that if there is a

substantial interest involved in the discharge of a public employee, other than mere employment by the State, procedural safeguards must be followed to determine whether legitimate grounds for his discharge do exist. Defendant contends that Plaintiff has suffered no economic injury and, in addition to the *Birnbaum* case, cites the following cases in support thereof: *Grausam v. Murphy,* 448 F.2d 197 (3rd Cir. 1971), and *Tichon v. Harder,* 438 F.2d 1396 (2nd Cir. 1971). Defendant concludes by saying that an action for breach of contract does not lie within the purview of 42 U.S.C. 1983, and this Court does not have jurisdiction because diversity of the parties is lacking. As a caveat, Defendant contends that pendent jurisdiction does not apply in this case, citing *Hurn v. Oursler,* 289 U.S. 238, 77 L.Ed. 1148 (1932), because Plaintiff presents a federal civil rights violation and a state violation for breach of contract in the same cause of action.

Concerning the lack of harm to Plaintiff caused by his discharge, the *Birnbaum* case, supra, does not require the Plaintiff to prove his case during pretrial discovery. The *Birnbaum* court determined that there were two substantial interests involved: the Plaintiff's reputation and the Plaintiff's ability to pursue a profession effectively. 371 F.2d at 678 (footnote 13). It has been asserted that there is no constitutional right to government employment. However, "[A]s the Supreme Court has recognized, the inquiry does not end with the statement that there is no right to work for the government", because "[T]he due process clause protects not only against impermissible grounds of discharge, but also against an improper manner of discharge." 371 F.2d at 678. Plaintiff complained that both protections were absent in his discharge by Defendant. In *Birnbaum,* the court went on to say:

> "Whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist." 371 F.2d at 678.

The Second Circuit Court of Appeals held that Dr. Birnbaum's complaint "stated a good cause of action under Section 1983." 371 F.2d at 675. The critical elements of the complaint were that Dr. Birnbaum was removed from his job prior to a hearing; false allegations concerning his conduct were made; he was summarily discharged, which gave the allegations "a stamp of official authority and not only deprived him of his employment, but seriously damaged his professional reputation in the community as a physician." 371 F.2d at 677. These very allegations are made by the Plaintiff in this case.

Defendant's reliance on *Grausam v. Murphey,* supra, is misplaced. There, the Plaintiff's discharge was upheld after he had been afforded an opportunity for an administrative hearing (which he substituted for trial in a district court) and a full review of the record by the Third Circuit Court of Appeals. Plaintiff was not afforded a hearing prior to his summary discharge in this case.

The *Tichon* case is distinguished from the case at bar on the grounds that there the court held that loss of profits was merely a property right and not connected with a right of personal liberty and, therefore, the discharge of employment was not a cause of action for which the court had jurisdiction under 28 U.S.C. 1343 (3). 438 F.2d at 1400. Here, Plaintiff's primary allegation is damage to his reputation and to his ability to pursue his profession effectively. See 438 F.2d at 1400.

Plaintiff alleges that the staff privileges at R. E. Thomason General Hospital are important to him in the maintenance and furtherance of his private practice of psychiatry in El Paso, Texas. See page 3 of Plaintiff's Brief in Response to Defendant's Second Amended Motion to Dismiss.

Were the Court to consider the breach of contract claim a matter of state action, it would be properly before this Court on the ground of pendent jurisdiction because both the state claim—breach of contract and the federal claim—deprivation of constitutional rights "derive from a common nucleus of operative fact" and are such that the Plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs,* 383 U.S. 715, 725, 16 L.Ed.2d 218, 227, 86 S.Ct. 1130, 1139 (1966); Wright, *Laws of Federal Courts,* page 64 (2nd Ed. 1970).

However, the Court need not go this far. The *Birnbaum* case is controlling and federal jurisdiction is founded on the alleged deprivation of Plaintiff's constitutional rights.

As jurisdiction here is based on the alleged violation of constitutional rights, lack of diversity of the parties is irrelevant.

PLAINTIFF'S MOTION TO REVERSE DECISION BY BOARD OF MANAGERS DENYING PLAINTIFF STAFF PRIVILEGES

Plaintiff's Motion and Brief in Support Thereof were filed with this Court on January 27, 1975. Therein, Plaintiff states five allegations:

(1) Judge Guinn's remand of the proceedings to the Defendant Hospital was improper and, therefore, a thorough review of those proceedings is necessary by the Court because the establishment of the proceedings themselves is unconstitutional.

(2) Plaintiff's application for staff privileges was improperly processed by Defendant Hospital.

(3) The allegation of incompetency used by the Board of Managers to support its denial of staff privileges is not supported by substantial evidence.

(4) The allegation of insubordination used by the Board to support its discharge of the Plaintiff is not supported by substantial evidence.

(5) Plaintiff is competent to be granted staff privileges by the R. E. Thomason General Hospital.

The Court agrees with Plaintiff's contentions Nos. 3 and 4; it is, therefore, unnecessary to consider allegations Nos. 1, 2 and 5.

Plaintiff alleges that the finding of incompetence is not supported by a review of the substantial evidence. "Substantial evidence" may be defined as such evidence as will convince reasonable men and on which they may not reasonably differ, that is, competent evidence such as a reasonable mind might accept as adequate to support a conclusion. 1 Tex. Jur. 2d Administrative Law, Section 42, p. 683. On a review governed by the substantial evidence rule, the issue is not whether the agency arrived at the proper conclusion on the basis of conflicting evidence, but whether it acted arbitrarily and without regard to the facts. The Court will inquire, not whether the

agency actually heard sufficient evidence, but whether the facts that existed at the time of the agency's decision or order were such as to justify its action. No question of preponderance of evidence is involved. It is for the Court to determine, upon a consideration of the whole record whether substantial evidence existed. 1 Tex. Jur. 2d Administrative Law, Section 43, p. 684, *Live Oak County v. Lower Nueces Water Supply District*, 446 S.W.2d 14, 24 (Tex. Civ. App. Beaumont 1969, Writ reaffirmed, n.r.e.).

Of the 16 patients named in a list submitted to the Plaintiff by the Defendant prior to the hearing, there was testimony on 11 of these patients. Of this number only 9 involved questions of professional incompetence. Plaintiff contends that these patients' cases were selected to show improper diagnosis by the Plaintiff and that Defendant attempted to create the impression that these patients were far more seriously ill than diagnosed by Plaintiff. Plaintiff contends that disagreement concerning diagnosis is common in psychiatry and, therefore, additional information is necessary to prove incompetence. See the discussion of the four psychiatrists' evaluation of the review of the charts of Plaintiff's patients contained in Appendix One to Plaintiff's Brief in Support of Motion to Reverse Decision by the Board of Managers denying the Plaintiff staff privileges (hereinafter referred to as "Brief"). See Brief, pages 8 and 9.

1. There is no evidence that the nine patients received improper treatment or suffered in any way under Plaintiff's care. One patient, in fact, returned to Plaintiff for treatment after Plaintiff established his private practice, and Plaintiff is currently treating the patient (M.V.) for schizophrenia at the present time (Statement

of Facts, hereinafter referred to as SF 480), Brief page 10.

2. There is conflicting testimony by Defendant's witnesses concerning Plaintiff's diagnosis. Plaintiff contends that this is a manifestation of a disagreement over terminology and approach in psychiatry among the doctors who testified. Brief page 10 and 11.

3. Plaintiff contends that the doctors who testified on behalf of Defendant were trying to hold him to a higher standard of professional care than they themselves were held.

4. Plaintiff contends that the allegations of the four psychiatrists who testified for Defendant cannot be supported by substantial evidence.

(a) Dr. Huddleston's statement that Plaintiff did not exercise the proper degree of care of a psychiatrist in El Paso County, Texas, is unsupported by the evidence in that Huddleston had not seen any of the patients—only the charts. See Brief pages 12 and 13. (S.F. 126) He gave no explanation at all to support his opinion. Brief page 12.

(b) Plaintiff contends that Dr. Jones' testimony that Plaintiff did not meet the standard of care in the three cases that Dr. Jones reviewed is also unsupported by the evidence. Dr. Jones stated that it is not important that there are differences in diagnosis of a patient if that patient is hospitalized. (S.F. 158), see Brief page 13 and 14. Plaintiff states that it is tempting for him to accept Dr. Jones' statement, as it reduced by more than one-half the alleged incidences of incompetence.

(c) Plaintiff contends that Dr. Raskins testimony is unreliable because of the strong inference that he committed perjury. See Brief pages 14-15.

(d) Dr. Hernandez refused to say that Plaintiff did not meet the proper standard of care. Brief page 15 (S.F. 252-253).

Plaintiff concludes on the basis of the above facts that there was no substantial evidence of incompetence. Plaintiff also contends that the statements above manifest the intention of the doctors who testified against him to hold him to a higher standard of care than they themselves were held. He cites the case of *Giles v. Breaux*, 160 Southern 2d 608, at 618 (Court of Appeals of Louisiana 1964). There, the Court held that in attempting to hold the doctor responsible for a higher standard of professional behavious than has been required of the other physicians on the staff of the hospital, the operating committee and the board acted in an arbitrary, capricious, and discriminatory manner.

Plaintiff contends that the Board of Managers in determining whether or not to grant Plaintiff privileges has the duty to judge present incompetence. As all the testimony above concerns events that transpired prior to August 1972, the Board must determine whether the Plaintiff is presently qualified to join the hospital staff. Plaintiff cites the fact that he was treating patients both privately and in other hospitals at the time he applied for staff privileges at R. E. Thomason General Hospital. Brief page 15. See Plaintiff's Affidavit attached to Brief. Plaintiff cites the case of *Wyatt v. Tahoe Forrest Hospital District*, 345 P.2d 93 (California Court of Appeals 1959) for the proposition that exclusion from the staff of a hospital must be for "existing cause", not for previous activities. Plaintiff then contends that the Defendant did not comply with this test.

Plaintiff contends that the patient cases presented by the Defendant at the April 25-26 hearing are not representative of the Plaintiff's abilities for the following reasons:

(1) that Plaintiff treated 1100 patients during his association with R. E. Thomason General Hospital and the samples selected as an evaluation of his work was only .0082% of all the patients he treated. Also, there was no evidence that this group was randomly selected. Plaintiff contends that the cases were selected by Dr. Marks solely to discredit the Plaintiff. Brief page 16 and 17. (S.F. 98) (S.F. 525).

(2) Dr. Alan O. Baylor, Professor of Statistics at the University of Texas at El Paso, with a Doctor's Degree in Mathematics and in Economics, deposed as Plaintiff's expert witness, stated in his Affidavit that the selection of the patients' cases was fatally defective because it was not random and the number of the sample was inadequate (See Dr. Baylor's Affidavit attached to Brief). Plaintiff contends, therefore, that there is scarcely any evidence, let alone any substantial evidence to support the Defendant's denial of staff privileges to the Plaintiff.

Plaintiff's fourth contention is that the allegation of insubordination used by the Board on its discharge of the Plaintiff was not supported by substantial evidence. There is no evidence that the Plaintiff was discharged for lack of professional competence. The only reason was for alleged insubordination. Brief page 18 (S.F. 235). Plaintiff contends that this raises further doubt about the allegation of incompetence, since the events occurred before Plaintiff's discharge and would logically have been brought forth at that time, if they are as serious as Defendant now claims. See Brief page 18.

The first peg upon which the claim of insubordination is hung is the allegation by Dr. Marks that Plaintiff refused to remove leg irons of a prisoner who was hospitalized without written instructions by Dr. Marks. Plaintiff contends the following:

(1) There is no evidence that Plaintiff was informed that the Board had taken a position of any kind on the matter of shackling of the prisoners.

(2) That Plaintiff was following the Sheriff's authority which had been established in the hospital over prisoner security. See Art. 46.01, Texas Code of Criminal Procedure, concerning the security involved in the transfer of a prisoner from prison to a mental hospital. Plaintiff contends that this authority would apply to a prisoner in R. E. Thomason General Hospital under observation for a few days.

(3) Plaintiff claims that following the law is not insubordination, and the request for written instructions by Dr. Marks before removal of the shackles was justified. See Brief pages 19 and 20.

The second peg upon which the decisions of insubordination rests concerns the Board's determination that the Plaintiff would not cooperate with Dr. Marks in the administration of certain established drug addiction and alcoholism programs at Defendant Hospital (S.F. 22-33). Plaintiff contends the following:

(1) While Dr. Marks continually emphasized that he was only a "layman" (S.F. 29, 42, 79, 84), most of his testimony seemed to question Plaintiff's professional opinions or conduct with respect to the particular patient involved and drug program. Only Dr. Hernandez com-

mented on the psychiatry and drug addiction and his testimony was ambiguous at best. (S.F. 266)

(2) This charge of insubordination is weakened by the fact that at the time it was made the hospital had not established any treatment procedures for alcoholic or drug addicted patients. The minutes of the August 1971 Executive Committee Meeting of the Hospital contains statements by Dr. Marks that the hospital had *never* handled Methadone patients and that such patients are referred to the Metal Health Retardation Center. (S.F. 465-66) On November 15, 1971, Dr. Marks wrote a letter indicating the hospital would not provide long term follow-up treatment for drug addiction. (S.F. 473-74) In November 1972, about three months after Dr. Laje's discharge, Dr Gomez stated that the narcotics program was not yet ready. (S.F. 469-70) See Brief page 22.

(3) Dr. Marks was concerned about Plaintiff's refusal to accept him as the medical coordinator and also concerned about Plaintiff's complaints about Dr. Marks that were made to the Board of Managers and Executive Committee which were being pursued in proper administrative forums within the hospital. (S.F. 54-55)

(4) Plaintiff contends that the evidence surrounding the controversies between Plaintiff and Dr. Marks indicates that Plaintiff's conduct was legally, ethically and professionally proper. At the least, the evidence reveals a great deal of confusion over these matters and a request for a written clarification was not unreasonable, let alone "insubordinate".

Plaintiff then recites his various qualifications to practice psychiatry at R. E. Thomason General Hospital:

(1) He is licensed by the State of Texas to practice medicine in the State. (S.F. 409-410)

(2) He is a member of the American Medical Association and the American Psychiatric Association. (S.F. 411)

(3) The El Paso County Medical Association has extended membership privileges to the Plaintiff. (S.F. 410)

(4) Plaintiff has been granted staff privileges in the other prominent El Paso hospitals to which he has applied—St. Joseph's Hospital, Providence Hospital, Sun Towers Hospital, and Hotel Dieu. (S.F. 400-01)

(5) Dr. Hernandez even requested that Plaintiff apply for privileges at his own hospital, El Paso Doctors' Hospital. (S.F. 401)

(6) The Credentials Committees at these hospitals reviewed Plaintiff's qualifications and gave their approval. (S.F. 500-505)

(7) The standard for the practice of psychiatry is the same in all hospitals. (S.F. 341); "You are competent or you are not." (S.F. 406)

(8) References in the hearing transcript to Plaintiff's competence and to his responsibilities as a member of the staffs of the various hospitals are set forth in pages 23-25 of the Brief.

By letter of April 21, 1975, Defendant's attorney, Mr. L. W. Anderson, referred to the Court the case of *Klinge v. Lutheran Charities Association of St. Louis*, 338 F.Supp. 287 (1974). In that case the Court granted summary judgment for the defendant hospital on the

grounds that contrary to plaintiff's allegations, due process of law was afforded to plaintiff at all stages of the proceeding in which the standard of medical practice was evaluated. This case is distinguished from the case at bar on the following grounds:

(1) Defendants there attempted to arrange a hearing shortly after their finding that defendant was incompetent to practice surgery, and the hearing was held only upon ruling of the court;

(2) The hearing was held before an attorney who was an independent decision maker;

(3) The basis for the allegation was a comprehensive review of the plaintiff's hospital records for the past five years; and

(4) The evidence was overwhelming that plaintiff simply should not practice as a surgeon. 383 F.Supp. at 290.

The *Klinge* court agrees with the Plaintiff here that the decision of the Administrative Committee should be reversed only if there is no substantial evidence having probative force to sustain its findings. 383 F.Supp. at 291. The Court then cites the case of *Duffield v. Memorial Hospital Association,* 361 F.Supp. 398, 404 (S.D. W.Va. 1973) in which the Court stated, "The Court is charged with the narrow responsibility of assuring that qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. 383 F.Supp. at

292. It is the responsibility of this court to evaluate the finding of the Board of Managers of R. E. Thomason General Hospital on the basis of substantiality of the evidence.

On April 28, 1975, the Plaintiff filed with this Court a supplemental brief in support of his motion to reverse the decision by the Board of Managers denying Plaintiff staff privileges. Plaintiff cites the case of *Rosener v. Eden Township Hospital District,* 375 P.2d 431, (S.Ct. of Cal. 1962) where a doctor, who had been granted staff privileges at 40 area hospitals but denied privileges at Eden Township Hospital, was ordered installed at the Eden Hospital. The California Supreme Court examined the record and determined that in regard to the disagreements at the hospitals between the doctor plaintiff and other personnel, the plaintiff appeared in a more favorable light than they did. 375 P.2d at 433. The Supreme Court recognized that disagreement as to proper treatment is natural in the medical profession, and acknowledged that refusal of access to a district hospital could, as a practical matter, have the effect of denying to a licensed doctor qualified to practice in California the right to fully exercise his profession. 375 P.2d at 434-435.

Plaintiff also cites the case of *Schlein v. Milford Hospital,* 383 F.Supp. 1263 (D. Conn. 1974) in which the Court held that Plaintiff's deprivation of staff privileges at a private hospital constituted an actionable claim under 42 U.S.C. 1983. The Court noted that the nature of the doctor's profession "requires that he enjoy staff privileges at a hospital in order to deliver the full range of services that he is licensed to perform." Furthermore, "the denial of staff privileges may seriously damage a physician's standing and associations in his professional community." 383 F.Supp. at 1264.

Plaintiff also calls the Court's attention to the case of *Visalli v. Mary's Help Hospital,* California Superior Court, San Mateo County, Docket No. 151707 (1974), in which the jury awarded $200,000.00 to a physician for the curtailment of his privileges by a hospital and a judgment was entered on the verdict. There has been no reported decision on the initiated appellate proceedings. This Court does not believe that the Board's decision is supported by substantial evidence. The minutia of cases selected for examination—.0082% of the cases treated by Plaintiff during the year—the unscientific and inadequate selection of those cases, and the hasty manner in which those cases were examined upon all of which the Board's decision of incompetency was made and the conflicting testimony of Defendant's doctors regarding Plaintiff's treatment of these cases does not provide a substantial evidentiary foundation for the Board's determination of incompetence.

Likewise, the charge of insubordination is not supported by substantial evidence. It appears to relate purely to personality conflicts between Plaintiff and Dr. Marks and is not founded on any substantial medical basis.

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Board of Managers of R. E. Thomason General Hospital denying the Plaintiff staff privileges be and it is hereby reversed and Plaintiff is ordered admitted to the staff of R. E. Thomason General Hospital.

IT IS FURTHER ORDERED that this cause proceed to trial on the following issues:

(1) Plaintiff's claim of wrongful discharge by Defendant Hospital in violation of 42 U.S.C. 1983;

(2) Plaintiff's claim of damages resulting from his denial of staff privileges by Defendant Hospital.

/s/ WILLIAM S. SESSIONS
William S. Sessions
United States District Judge

February 6, 1976

B-1

Luis J. LAJE, Plaintiff-Appellee,

v.

R. E. THOMASON GENERAL HOSPITAL,
Defendant-Appellant.

No. 76-1496.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Dec. 19, 1977.

Suit was brought by former clinical director of phychiatry seeking compensatory and punitive damages of $380,000 because of deprivation of procedural due process in connection with hospital's termination of his contract and its subsequent refusal to grant him staff privileges. The United States District Court for the Western District of Texas, at El Paso, William S. Sessions, J., directed county hospital to grant staff privileges, and hospital appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) hearing conducted on remand to hospital board of managers on issue of denial of privileges comported with procedural requisites of due process and (2) while not every witness agreed that former director's performance was unacceptable, hospital board heard sufficient evidence of kind relevant to its decision to support its denial of staff privileges.

Reversed and remanded.

James K. Read, El Paso, Tex., L. W. Anderson, C. A. Searcy Miller, Dallas, Tex., for defendant-appellant.

Broadus A. Spivey, Austin, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

TUTTLE, Circuit Judge:

In this appeal, R. E. Thomason General Hospital challenges the correctness of a district court order which directed the county hospital to grant staff privileges to Dr. Luis Laje because the hospital's denial of privileges was not supported by substantial evidence of incompetence and insubordination, the asserted grounds for the refusal of privileges.

[1, 2] The lawsuit originated upon Dr. Laje's complaint in which he sought compensatory and punitive damages of $380,000 because of a deprivation of procedural due process in the hospital's termination of his contract as clinical director of phychiatry and its subsequent refusal to grant him staff privileges. Jurisdiction was based upon 28 U.S.C. § 1343(3) and (4), the jurisdictional companion to 42 U.S.C. § 1983, and upon 28 U.S.C. § 1331(a), the federal question section. Because the complaint alleges an unconstitutional deprivation of property without due process of law and the requisite jurisdictional amount, we find jurisdiction proper under § 1331. Therefore, we need not determine whether the hospital is a person for purposes of section 1983. *See Muzquiz v. City of San Antonio,* 528 F.2d 499 (5th Cir. 1976) (en banc). We further hold that appellate jurisdiction exists on the basis of 28 U.S.C. § 1292(a)(1) because the interlocutory order challenged here was in the nature of an injunction.

The facts upon which this lawsuit is based can be briefly stated. In 1971 Dr. Laje entered a two-year contract to serve as clinical director of phychiatry at R. E. Thomason General Hospital. After 13 months he was summarily discharged on grounds of insubordination. Shortly thereafter, Dr. Laje applied for staff privileges at the hospital. His request was referred to the Psychiatric Committee, which failed to take any action within the three-month limit specified in the hospital by-laws. When the three-month period had elapsed, the hospital's Executive Committee initially recommended granting privileges. Meanwhile, however, the Psychiatric Committee met and decided to recommend against privileges for Dr. Laje. The Executive Committee apparently reversed its earlier decision, but the only notice sent to Dr. Laje was unclear on the status of his request. After futile attempts to obtain a hearing, Dr. Laje filed suit.

Upon a motion by the hospital, the district court remanded the matter to the hospital's Board of Managers for a hearing on the issue of denial of privileges; matters relating to the discharge issue were held in abeyance.[1] The court's remand order directed the hospital to provide Dr. Laje with a bill of particulars and a list of witnesses. The hospital also made relevant hospital records available for Dr. Laje's inspection. Pursuant to the remand order, a two-day hearing was held before the hospital board. Dr. Laje was permitted to cross-examine the hospital's witnesses and to prevent evidence of his own; he was represented by counsel throughout the proceedings.

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1. The contract termination count of Dr. Laje's complaint has not yet been considered on its merits by the district court, although a motion to dismiss the count has been denied. Consequently, that portion of the case is not part of this appeal.

At the hearing Dr. Marks, the medical director of the hospital, and several psychiatrists testified for the hospital. They discussed 11 patients who had been treated by Dr. Laje during his tenure as clinical director and testified that he had misdiagnosed several of these patients. Specific examples were cited by the doctors, although Dr. Laje challenges their familiarity with the patients. While the testimony was not perfectly consistent, several doctors expressed the opinion that Dr. Laje's treatment of patients was below an acceptable measure of competence. On the issue of insubordination, testimony was elicited to show that Dr. Laje had refused to cooperate in the treatment of drug addicts, a point disputed by Dr. Laje, and that he had breached hospital policy by using leg irons to restrain a prisoner-patient. Dr. Laje insisted that the sheriff had ordered the use of shackles and that a state law gave this authority to the sheriff. Certain evidence showed that Dr. Laje's relationship with Dr. Marks was strained; Dr. Laje felt that Dr. Marks was interfering with his professional judgment and requested that Dr. Marks put his orders in writing if he wished Dr. Laje to comply with them. Dr. Laje presented the deposition of a statistician who criticized the nonrandom selection of the patients whose cases were scrutinized and the statistically unreliable size of the sample pool.

Some time after the hearing, the board decided to deny privileges by a vote of four to one upon grounds of incompetence and insubordination. By amended complaint Dr. Laje sought to have the board's decision reversed. Additionally, he filed a motion requesting the district court to order the hospital to grant him privileges because of a lack of substantial evidence to support the board's decision. The district court granted this motion in an opinion dated February 6, 1976, stating:

> This Court does not believe that the Board's decision is supported by substantial evidence. The minutia of cases selected for examination—.0082 percent of the cases treated by Plaintiff during the year—the unscientific and inadequate selection of those cases, and the hasty manner in which those cases were examined upon all of which the Board's decision of incompetency was made and the conflicting testimony of Defendant's doctors regarding Plaintiff's treatment of these cases does not provide a substantial evidentiary foundation for the Board's determination of incompetency.
>
> Likewise, the charge of insubordination is not supported by substantial evidence. It appears to relate purely to personality conflicts between Plaintiff and Dr. Marks and is not founded on any substantial medical basis.

The court's order was stayed pending the outcome of this appeal.

In reaching its decision, the district court verbalized an accurate definition of the substantial evidence test when it said: "On a review governed by the substantial evidence rule, the issue is not whether the agency arrived at the proper conclusion on the basis of conflicting evidence, but whether it acted arbitrarily and without regard to the facts."

However, in overruling the decision of the board, the court strayed from its own directive and substituted its own judgment for that of the hospital board. In doing so, it "misconceive[d] the limited scope of judicial review in cases of this kind." *Woodbury v. McKinnon,* 447 F.2d 839, 846 (5th Cir. 1971).

[3] The correct approach to the judicial review of the hospital's denial of staff privileges is set out in *Woodbury*

v. McKinnon, supra, and *Sosa v. Board of Managers of Val Verde Memorial Hospital,* 437 F.2d 173 (5th Cir. 1971). Those cases make clear that the decision of a hospital's governing body concerning the granting of hospital privileges is to be accorded great deference. This is so because of the court's obvious lack of medical expertise. Judicial intervention must be limited to an assessment of those factors which are within the court's expertise to review. For this reason, our cases have gone no further than to require that the procedures employed by the hospital are fair, that the standards set by the hospital are reasonable, and that they have been applied without arbitrariness and capriciousness. *Woodbury v. McKinnon,* 447 F.2d at 845. As we stated in *Woodbury,* "[t]he decision resulting from the hearing must be untainted by irrelevant considerations and supported by sufficient evidence to free it from arbitrariness, capriciousness or unreasonableness." *Id.* at 842.

[4] In this case, it is clear that the hearing conducted on remand to the board comported with the procedural requisites of due process. Dr. Laje received notice of the charges, and he had an opportunity to present his own evidence and to cross-examine the hospital's witnesses. Moreover, Dr. Laje has failed to convince us that the hospital board was not an impartial decisionmaker. *See Megill v. Board of Regents of The State of Florida,* 541 F.2d 1073 (5th Cir. 1976); *Woodbury v. McKinnon, supra; Ferguson v. Thomas,* 430 F.2d 852 (5th Cir. 1970). The record does not demonstrate the actual bias needed for disqualification of an administrative tribunal. *Megill, supra,* at 1079.

[5, 6] As for the substantiality of the evidence upon which the board's adverse decision was based, we find

that the record contains sufficient evidence to support the denial of privileges. The evidence presented at the hearing related to the level of Dr. Laje's professional competence and his ability to function smoothly in the hospital setting. Thus, the board complied with this Court's guideline in *Sosa* that "in exercising its broad discretion the board must refuse staff applicants only for those matters which are reasonably related to the operation of the hospital." 437 F.2d at 176-77. To discount the evidence against Dr. Laje because of statistical flaws in the nonrandom selection of cases and the small sample size is improper. The hospital, and not the courts, must set the level of competence to be required of staff members. As we recognized in *Sosa,* "[t]he governing board of a hospital must therefore be given great latitude in prescribing the necessary qualifications for potential applicants." *Id.* at 176.

While not every witness agreed that Dr. Laje's performance was unacceptable, the board heard sufficient evidence of the kind relevant to its decision to support its denial of privileges. As we said in *Sosa*:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsi-

bility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere.

437 F.2d at 177.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

February 1, 1978

TO ALL PARTIES LISTED BELOW:
NO. 76-1496—LUIS J. LAJE v. R. E. THOMASON GENERAL HOSPITAL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on re-

hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By: /s/ BRENDA M. HAUCK
Deputy Clerk

**on behalf of appellee, Luis J. Laje,
bmh
cc: Mr. James K. Read
Messrs. L. W. Anderson
C. A. Searcy Miller
Mr. Broadus A. Spivey

C-1

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 76-1496

D. C. Docket No. EP-73-CA-264

LUIS J. LAJE, Plaintiff-Appellee,

versus

R. E. THOMASON GENERAL HOSPITAL,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

Before TUTTLE, COLEMAN and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

December 19, 1977

ISSUED AS MANDATE: February 9, 1978